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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1950**

# No. 258

DEAN MILK COMPANY, A CORPORATION,
*Appellant,*

*vs.*

CITY OF MADISON, WISCONSIN, A MUNICIPAL CORPORATION, DR. C. K. KINCAID, AS HEALTH COMMISSIONER FOR THE CITY OF MADISON, WISCONSIN, LEONARD HOWELL, AS CITY MANAGER OF THE CITY OF MADISON, WISCONSIN, AND THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,
*Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

## STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

WALTER P. ELA,
*Attorney for Appellees,*
*Madison, Wisconsin.*

HAROLD E. HANSON,
*Of Counsel.*

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## STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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The Appellees in the above-entitled cause for their joint statement in opposition to Appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

### I. Nature of Case.

The Madison, Wisconsin, milk ordinance, which is under attack by the appellant in this case, regulates the distribution and sale of whole milk for direct human consumption in the City of Madison (R. p. 264). It does not regulate

the production of milk produced on farms for use outside the City of Madison. Madison is the center of Dane County which produced in 1948 over 600,000,000 pounds of milk. This is more than ten times the milk used in the City of Madison. Large quantities of milk are shipped to the Chicago market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the capitol square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished entirely from farms located within about 18 miles of the capitol square. (R. p. 3). At the time of the trial about 500 farms in Dane County were delivering milk to the Madison market. Sixty per cent of those farms were within ten miles of the City of Madison, none were further than twenty miles (R. p. 118). A tremendous amount of milk produced on farms in Dane County is shipped to Chicago for fluid milk distribution. Inspectors from the Chicago Board of Health make inspection of farms in Dane County producing milk for the Chicago market. (R. p. 119). The Wisconsin Department of Agriculture leaves to Wisconsin cities the responsibility of protecting the purity of fluid milk but assumes the responsibility for the enforcement of regulatory provisions pertaining to Grade "B" milk (for manufacturing purposes). At the time of the trial there was roughly 4,000,000 pounds of fluid milk and cream consumed in Madison in a month (R. p. 118). In 1945 the following amounts of dairy products were produced in Dane County:

| | |
|---|---|
| Butter | 4,447,000 pounds |
| Cheese | 12,683,000 pounds |
| Evaporated and Condensed Milk | 55,497,000 pounds |
| Powdered skim milk | 7,142,000 pounds |
| Ice Cream | 444,000 pounds |

(R. p. 117). The city, therefore, exercises regulatory control over less than a tenth of the milk produced in Dane County. The State or Inspectors of the Chicago Board of Health, making inspections under the Chicago milk ordinance exercise regulatory control over the balance (R. p. 119). Approximately 9/10ths of the milk produced in the area which furnishes milk to the Madison market is, therefore, not subject to the Madison milk ordinance. The Madison ordinance provides health precautions and sanitary regulations, as well as inspection of the pasteurization plants, and also for periodical inspection of all farms supplying such plants (R. p. 237). No attack is made upon any provisions of the ordinance except sections 7.11 and 7.21. 7.11 provides:

> "It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk products as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.
>
> "Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.
>
> "On filing of an application for a permit with the Health Commission, he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison otherwise known as the Capitol Square. If the source of supply named therein conforms to the standards of this ordinance a permit may be issued by the Department of Public Health and

shall remain in effect unless revoked in accordance with the provisions of this or other ordinances of the City of Madison, or until there is a change in ownership or tenancy of the premises. . . ."

Section 7.21 of the Madison milk ordinance provides:

"Pasteurization Plants to Be Within Five Mile Radius. It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

The Madison milk ordinance (R. p. 237) contains detailed provisions regulating the construction of farm buildings and laying down standards for milking and cooling procedure and for farm sanitation (sections 7.15 (2) and 7.16). The ordinance similarly has detailed regulations for milk processing and distribution (sections 7.19, 7.20 and 7.21). The Madison ordinance defines Grade "A" pasteurized milk as "milk produced in accordance with section 7.15 (1) (b), (2) to (24), inclusive, and which has been pasteurized, cooled and bottled in a milk plant conforming with all of the following items of sanitation and the average bacterial plate count of which, at no time after pasteurization until delivery, shall exceed thirty thousand (30,000) milliliter as determined under section 7.09 (21) and section 7.14. The coliform count shall not exceed five (5) milliliters as determined under section 7.14. The allowable bacteria count as stated above for grade "A" pasteurized milk shall be applied to all milk or milk products as defined in this ordinance. The allowable bacteria count

of thirty thousand (30,000) per milliliter shall not apply to buttermilk, cottage cheese and sour cream. The inspection of milk plants shall also include receiving stations, and shall conform with the following items. . . ."

The Dean Milk Company is a Chicago corporation which operates several plants in Illinois. It operates two pasteurizing plants located at Chemung and Huntley, Illinois. (R. p. 78). The Dean Milk Company obtains its milk from approximately 950 farms in northern Illinois and southern Wisconsin (R. p. 80). Chemung, Illinois is about sixty-five miles southeast of Madison and Huntley is about eighty-five miles from Madison (R. p. 84). The farms that furnish these plants with milk are located in an area about 20 to 25 miles around the plants (R. p. 84). The farms which produce milk for the Dean Milk Company are inspected by inspectors of the Chicago Board of Health acting under the Chicago milk ordinance (R. p. 75). Under the Chicago milk ordinance all farms producing milk for the Chicago market are inspected by inspectors from the Chicago Board of Health (R. pp. 91, 119). The Madison milk ordinance is not similar in all respects to the Chicago milk ordinance. In many respects the Madison milk ordinance contains higher standards (R. pp. 130-134).

Both the Madison and the Chicago milk ordinance contain many of the provisions of the United States Public Health Service model ordinance but neither of them contain all of the provisions. The United States Public Health Service model ordinance is not a law or ordinance at all in the sense of it being adopted by the United States. It is merely a model ordinance prepared by personnel in the United States Public Health Service as an aid to municipalities in formulating their own milk ordinance (R. p. 146). The United States Public Health Service do not insist that any municipality adopt the model ordinance as worded. Changes in the model ordinance by different municipalities

to fit their purpose are recognized and expected and municipalities will be given credit for up-grading. (R. p. 146). Section 11 of the model ordinance (R. p. 191) providing for reciprocal inspection, provides as follows:

> "*Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the city of —— may not be sold in the city of ——, or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: Provided, That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

(R. p. 191). The City of Madison refused to adopt this provision of the model milk ordinance and in lieu thereof adopted section 7.21 (R. p. 66).

Upon the trial evidence was introduced to show that in order to safeguard the supply of milk for human consumption it was necessary to provide for minute regulations of the cattle from which milk is produced, the barns and surroundings where the cattle are kept and the means whereby the milk is transported from farm to market; also, that it is necessary to make minute inspections of the plants where the milk is processed and pasteurized; also, that merely taking bacteria counts of the finished product is not sufficient to protect the public (R. pp. 119, 135, 149, 159).

Both the United States Public Health Service model ordinance and the Chicago milk ordinance contain minute provisions for inspection of dairy cattle, dairy barns and milk processing plants (R. p. 161).

Under the reciprocal inspection provision of the model milk ordinance (Section 11) the recommendation of the United States Public Health Service and the practice of cities adopting such ordinance is to rely upon the grading

system of the United States Public Health Service (R. pp. 89, 96, 108, 191). This grading system of the United States Public Health Service is a system whereby an entire milk shed is sampled by a "spot check" procedure both at the farm and at the plant and the results are weighed and graded by state government personnel in accordance with practices recommended by United States Public Health Service to give a "grade" for the whole milk shed (R. pp. 144-146). Mr. Luchterhand, from the Wisconsin State Department of Public Health, testified that this rating system is to help evaluate local enforcement, that it is used by some communities in determining whether to accept milk from another milk shed and that a high rating does not necessarily mean that all milk sold on the milk shed is safe. He testified that on the Chicago milk shed with 10,000 or more farms, the rating was based on inspection of 200 farms and the same representation of the total number of pasteurization plants (R. p. 145). He stated that the fact that the Chicago milk shed was graded over 90% (a satisfactory grade under United States Public Health procedure) in the last grading (made in 1947) did not necessarily mean that any of the farms supplying the Dean plants, or any of the Dean plants, were actually inspected and included in the grading (R. p. 157). He testified that there is nothing in the United States Public Health code and particularly in Section 11 thereof, that would require a city to rely on the grading system in determining whether to accept milk; that the United States Public Health Service does not object to a city introducing higher requirements than those contained in the United States Public Health code and that reliance by a city on the grading process is entirely voluntary with the city. (R. p. 157).

The Madison Health Department milk inspection staff consists of one full time dairy sanitarian and an additional sanitarian who spends most of his time in this work. They

inspect some 500 farms supplying the Madison market and the dairy plants. Their salaries are $280 and $300 per month. If 950 more farms were to be inspected and were all located within a 25 mile limit, it would require approximately two additional full-time sanitarians. If these additional farms were located where the plaintiff's farms are located, there would be required an additional three, or more, sanitarians working full time (R. p. 129). It would mean added expense to the city for additional salaries, mileage and living expenses of the inspectors working in Illinois and southern Wisconsin. The city would also need additional laboratory facilities located near the farms or facilities would have to be provided for getting milk samples from the Illinois farms back to Madison for making laboratory tests in Madison. This would involve additional expense.

The Dean Milk Company does not transport milk to or sell milk in the City of Madison or Dane County, nor does it propose to. It sells bottled, pasteurized milk to Robert Adler at Chemung, Illinois. Robert Adler transports the milk in his own refrigerated truck and sells it to stores in Wisconsin, including various communities in Dane County (R. p. 103).

There are three dairies located within the five mile radius pasteurizing and delivering milk in the City of Madison, the Borden Company, the Bowman Farm Dairy and the Bancroft Dairy, also the Madison Milk Producers Association, which is an association of farmers whose chief objective is to supply the City of Madison with fluid milk, maintains a surplus plant which processes Swiss cheese. (R. p. 118). This association has more than 350 members.

After the denial of a license solely because the pasteurization plant from which the appellant was to bring milk for direct consumption in the City of Madison was outside the prescribed limits of section 7.21, appellant brought

an action for declaratory judgment in the Circuit Court for Dane County for the purpose of determining the validity of both section 7.11 and section 7.21 of the Madison milk ordinance. The Circuit Court upheld the validity of section 7.21 and dismissed the action as to section 7.11 for lack of a justiciable dispute. Upon appeal the Supreme Court of Wisconsin on June 30, 1950, entered judgment affirming the decision of the lower court. It is conceded that the federal questions now raised in this case were raised and urged throughout all the proceedings in the state court.

## II. Question Involved Is Unsubstantial.

It is denied that the Supreme Court of Wisconsin held in this case that a municipality might arbitrarily restrict and limit the production and sale of any wholesome food to such surrounding territory as the municipality deemed capable of producing and processing the necessary amount to supply its population.

The trial court in its opinion expressly repudiated any such doctrine in the following language:

> "Madison's five mile pasteurization ordinance is a valid regulation under the 'police power' to protect the public health and welfare. It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than if such establishments were located anywhere in the United States.
>
> "A city like Madison, in the interests of public health, is entitled to set up its own system of milk inspection if it be a reasonable one. The City is not forced to rely upon inspection by some other governmental unit nor to submit to 'reciprocal inspection' unless some higher authority properly decrees it.
>
> "One municipality does not have to sacrifice its standards to those of another community which may

be lower nor is one governmental unit necessarily compelled to yield its independence to another, even though the latter's gauges of inspection purport to be equal or slightly higher.

"The City of Madison—in the public concern over health—has an autonomy, a measure of local self-government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet. * * *"

The following excerpts from the opinion of the Supreme Court of Wisconsin in this case, *Dean Milk Co.* v. *City of Madison*, 43 N. W. (2) 480 at page 483, repudiate any implication that the Court held that the city may impose trade barriers upon the production and processing of milk:

"We agree with the trial court. The five-mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of the ordinance was not adopted to exclude plaintiff, nor does it discriminate against it.

"As to plaintiff's contention that the twenty-five mile limitation is likewise unconstitutional, we affirm the trial court in holding that there is no justiciable controversy between the parties on that question. Dean Milk Company is not a farmer and, so far as the record shows, owns no farm. No farmer producing milk is a party to this action, and plaintiff is not entitled to ask for a judgment declaring the rights of persons who are not parties to the action."

The facts in this case equally repudiate the assertion in petitioner's brief that the intent or effect of the ordinance is to create a trade barrier. The City of Madison is in the center of a large milk producing area. It produces ten times as much milk as the inhabitants consume. The ordinance requiring pasteurization plants to be located

within a five mile radius of the City of Madison is a reasonable health measure because it simplifies the inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspection than if such establishments were located anywhere in the United States and minimizes the expense of inspection (R., p. 53). The natural result of plants being located close to the city is that farms delivering milk to such pasteurization plants will also be located within a close radius governed by transportation economics so that inspection by city health authorities of not only the pasteurization plants but also of the farms which supply those plants is made convenient and efficient and the cost of such inspection to the city and its taxpayers is kept within reasonable bounds (R., p. 122).

It cannot be soundly argued that the Madison ordinance creates a trade barrier merely because the appellant refuses to comply with it. There is nothing to prevent him pasteurizing his milk within the five-mile radius as other producers are required to do. If he is permitted to deliver milk into the City of Madison not produced in compliance with the City of Madison ordinance, a distance of 65 to 85 miles, then others will have the right to haul from greater distances and from different directions—and incidentally, from localities where there may be no local inspection at all. Under these conditions there would no doubt be a partial, if not a total, breakdown in the inspection service of the city. The selfish business interests of a lone operator are not to be compared to the health of an entire community. The City of Madison cannot be required to rely upon the spot checks of the United States Public Health Service made once in two years to safeguard the milk supply of its inhabitants, especially where the evidence shows that these spot checks may not even cover the farms or producing plants of the dairy which wishes to introduce its milk with-

out compliance with the provisions of the Madison ordinance.

The basic law was fully set forth by the Supreme Court of Wisconsin in *Dean Milk Company* v. *City of Madison* in reiterating the language it used in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. (2d) 733, as follows:

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. 11 Am. Jur. Constitutional Law, p. 1092, sec. 307. Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinance. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a *prima facie* presumption that it is reasonable. 3 McQuillin, Mun. Corp. (2d ed.) p. 110, sec. 951. The reasonableness of an ordinance depends upon the purposes sought to be accomplished and the effect upon all who must comply with it."

That milk is a product which requires meticulous inspection and supervision all the way from cow to consumer, and which demands the most stringent and detailed regulatory legislation to preserve the public health has long

been recognized by all courts. And municipalities have been recognized as having the widest latitude in the enactment of regulatory milk ordinances even though they impose drastic restrictions on private business. Innumerable cases to this effect could be cited; we limit ourselves to two quotations. In *Pfeffer* v. *Milwaukee*, 171 Wis. 514 at 517, 177 N. W. 850, this court stated:

> "Public health demands that milk and all milk products should be pure and wholesome. It is also common knowledge that milk containing deleterious organisms is an unsuitable article of food. Milk is known to be a product easily infected with germ life and to require special attention and treatment in its production and distribution for consumption as an article of food.
>
> "Under these circumstances and conditions of the milk business it was proper for the common council of the city of Milwaukee to determine in its legislative function what means and methods were best adapted to accomplish the object of supplying the people of the city of Milwaukee with wholesome milk."

The Illinois Court has stated the proposition in somewhat more detail in *Koy* v. *City of Chicago*, 263 Ill. 122; 104 N. E. 1104, 1107:

> "There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation, and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome, and free from the bacilli of any disease, but they may and do, in order to produce these results, prescribe the manner in which such purity, wholesome

ness, and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations, and to contain certain required information; the milk to be prepared in the manner, at the times, and by the means directed, and at all times to be subject to inspection. These may be drastic restrictions upon a private business; but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health."

All courts have recognized that they will not disturb municipal ordinances in the absence of a showing of palpable unreasonableness or where there is room for difference of opinion. This court has long recognized this doctrine. Even state and local economic policies and enactments under due process attack will not be nullified unless they are palpably unreasonable or arbitrary. In upholding the New York State Milk Control law, this court stated:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. . . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible pre-

sumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

*Nebbia* v. *New York*, 291 U. S. 502 at 537, 54 S. Ct. 505, at 516.

The Supreme Court of Wisconsin has said in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, at 616:

> "Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations. . . ."

In *Dean Milk Co.* v. *City of Chicago*, 385 Ill. 565, 53 N. E. (2) 612, the plaintiff which is also plaintiff in this action, contended that a Chicago ordinance permitting delivery of milk only in glass bottles and not in paper containers was unreasonable and hence unconstitutional. The court sustained the ordinance and lucidly set forth the functions of courts in reviewing the reasonableness of municipal ordinances:

> "It is well settled that when a city exercises its power of regulation upon a subject, *courts will not declare the regulatory provisions void unless they are palpably unreasonable and arbitrary*, and that courts are without power to inquire into the wisdom of an ordinance and have nothing to do with the mere policy of legislation (citing cases). *A court will not hold an ordinance void as being unreasonable where there is room for a fair difference of opinion on the question*, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose (citing cases). . . ."
>
> 385 Ill. 565 at 578.

In *Hauge* v. *City of Chicago*, 299 U. S. 241, 57 S. Ct. 241, this Court upheld, against a due process attack, a Chicago ordinance requiring that all merchandise sold in load lots by weight must be weighed by a public weighmaster in the City of Chicago even though that required the expense and burden of unloading and reloading each truck after arrival in the city. The requirement of pasteurization of Madison's milk within five miles of the city's center, as contained in section 7.21 of the Madison ordinances, is no more subject to attack than this Chicago ordinance.

It is submitted that section 7.21 of the Madison ordinance is neither unreasonable, nor arbitrary and that it does not violate the Fourteenth Amendment to the Constitution of the United States.

In reference to the claim that section 7.21 of the Madison city ordinance is invalid under the Interstate Commerce Clause, the case of *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528, is in point. That case involved a claim that a Pennsylvania statute requiring licensing and regulating of milk dealers violated the Interstate Commerce Clause. The court said:

> "Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready

assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse."

It may well be within the power of Congress to regulate interstate shipments of milk and to set up a detailed system for federal inspection of milk which is to be shipped in interstate commerce. But Congress has not done so. To this date Congress has recognized that the regulation of the production and delivery of milk are local matters. There is no federal regulation. Even the United State Public Health Service only suggests its "model ordinance" to cities; it recognizes that it has no power to compel the acceptance of any part of that form of ordinance by any locality and that it is entirely within the prerogative of any locality to accept or refuse any part of the suggested form of ordinance and to make "upward revisions" from the suggested form.

To adopt plaintiff's argument that all "pure and wholesome" milk must be admitted in interstate commerce free and clear of local right of decision as to what milk it will consider to be "pure and wholesome" and free and clear of all local regulation, would amount to denial of the very theory on which the federal government itself has operated for years in *suggesting* the USPH ordinance, rather than in *ordering* such code as the standard for interstate commerce. To adopt plaintiff's argument would be tantamount to a finding that Congress has adopted some standard — the standard being unstated even by plaintiff—for the interstate shipment of milk. Congress has never adopted any such standard—it has left the field to the exercise of local police powers for the protection of public health.

The pasteurization limit of section 7.21 does not prohibit interstate commerce at all. It imposes no greater restriction on interstate shipments of milk than on intrastate shipments. As the trial court aptly stated: "That requirement

seizes upon the product after it has come to rest in the state. That is not a prohibition of interstate commerce. It is a purely local regulation."

This court has repeatedly recognized the power of states to enact health measures even though they may affect interstate commerce, as distinguished from the burdening of interstate commerce for the state's economic advantage.

> "It (Mr. Justice Cardozo's opinion in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511) recognized, as do we, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce." *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 531, 69 S. Ct. 657, 662.

Section 7.21 of the Madison ordinances is clearly a health measure, as it was recognized to be by both the trial court and the Wisconsin Supreme Court. It is submitted that under recognized doctrines of this court it does not in any way violate the Interstate Commerce Clause of the Constitution of the United States.

## III. Discussion of Authorities Cited in Appellant's Statement.

Appellant on page 21 of his typewritten statement refers to General Order 125 of the Wisconsin State Department of Agriculture, effective November 15, 1949, entitled "Standards and Regulations for the Production and Processing of Milk and Milk for Interstate Shipment." Aside from the fact that this order appears nowhere in the record and was not introduced on the trial of the case, it should be pointed out that the matter contained in this document is merely part of a sales promotion campaign instituted by the Director of the State Department of Agriculture in order to promote the sale of Wisconsin milk by providing a service to

such out-of-state purchasers as may wish to use it. It merely suggests cooperative effort of Wisconsin producers of milk who may wish to enter the program and contains no sanctions or penalties. It has not the force of law. The State of Wisconsin does not purport to or attempt to make inspections of fluid milk unless requested under the new order. It leaves all such regulations and inspections to local communities.

The case of *H. P. Hood & Sons* v. *Dumond*, 336 U. S. 525, cited in the appellant's statement, involved a pure case of economic trade barrier legislation having no relation to any health regulation. As said by the Court at page 530:

> "The present controversy begins where the Eisenberg decision left off. New York's regulations designed to assure producers a fair price and a responsible purchaser, and consumers a sanitary and modernly equipped handler, are not challenged here but have been complied with. It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests, that are in question here and no such measures were attempted or such ends sought to be served in the Act before the Court in the Eisenberg case."

The case of *Sheffield Farms Co., Inc.* v. *Seaman* (N.J.) 114 N.J.L. 455, 177 A. 372, cited in appellant's statement, is not comparable. In that case, despite the fact that the plaintiff had a State of New Jersey license to sell milk anywhere in the state and had complied with both city and state laws, it was arbitrarily refused a license by the Board of Health of the City of Perth Amboy solely because the city had enough milk dealers.

In *State ex rel. Larson* v. *City of Minneapolis*, 190 Minn. 138, 251 N. W. 121, the city ordinance in question gave no consideration to the supply of milk available in the area

and provided for no inspection of farms supplying pasteurization plants. Section 7.13 of the Madison ordinance (R. p. 247) provides for a frequent periodical inspection of all farms suplying milk to the pasteurization plants in the Madison area.

Most of the cases cited by appellant involved attempts by cities to contravene standards, contracts or inspection systems established by the states wherein the cities were located and the basis of the decisions was that the state regulation must control. Such cases are *Prescott* v. *City of Borger* (Tex. App.) 158 S. W. (2d) 578; *Urban* v. *Taylor*, (N. J.) 188 Atl. 232; *Wenoka* v. *Rose Lawn Dairy* (Okla.), 212 Pac. (2d) 1056; *Moultrie Milk Shed, Inc.* v. *City of Cairo* (Ga.), 57 S. E. (2d) 199; *La Franchi* v. *City of Santa Rosa*, 8 Cal. (2d) 331, 65 Pac. (2d) 301; *Meridian, Ltd.* v. *Sippy*, 54 Cal. App. (2) 214, 128 Pac. (2d) 884. As pointed out above, Wisconsin leaves the regulation of fluid milk to its municipalities, and the basis of the above mentioned decisions does not apply.

The Illinois cases cited in appellant's statement are all grounded on the fact that the Illinois Cities and Villages Act, which is the sole source of municipal authority in Illinois, specifically provides that a city cannot exercise police jurisdiction beyond one-half mile from its corporate limits. So in *Higgins* v. *City of Galesburg* (Ill.), 401 Ill. 87, 81 N. E. (2d) 520, the court held that the city was without power to inspect and license farms and plants beyond that limit. This decision was followed by the Illinois Court in its decision in *Dean Milk Company* v. *City of Waukegan*, 403 Ill. 597, 87 N. E. (2d) 751, that under the Illinois statutes an Ilinois city has no jurisdiction beyond the one-half mile limit. Further, the court pointed out that no contention was made in that case by the city that it should inspect all sources of milk itself, and it was already accepting milk

inspected by only the City of Winnetka. None of these items is present in the case at bar.

It is respectfully submitted that the questions presented in this appeal do not raise any substantial federal question.

WHEREFORE, Appellees respectfully move that the within appeal be dismised or that the judgment and decree of the Supreme Court of the State of Wisconsin be affirmed.

WALTER P. ELA,
*Attorney for Appellees.*

HAROLD E. HANSON,
*Of Counsel.*